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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. ANTHONY DUANE PERRY, Defendant and Appellant.	C086531 (Super. Ct. No. 14F00817)

Defendant approached Anastassiya Cebotari in a parking lot with a pistol and demanded money; when she could produce only a few dollars he forced her to enter her family's condominium where he tied her up, stole several items, and assaulted her father. A jury found him guilty of one count of second degree robbery (of Cebotari in the parking lot) and two counts of first degree robbery (of Cebotari and her father in the

residence) (Pen. Code, §§ 211, 212.5),[1] kidnapping for robbery (§ 209, subd. (b)(1)), first degree burglary (§ 459), and assault with force likely to cause great bodily injury (§ 245, subd. (a)(4). The trial court found true allegations that defendant had two strike priors (§§ 667, subd. (e)(2), 1170.12, subd. (c)(2)), two serious felony priors (§ 667, subd. (a)), and had served three prior prison terms (§ 667.5, subd. (b)). Sentenced to a determinate term of 30 years (see *People v. Williams* (2004) 34 Cal.4th 397) consecutive to an indeterminate term of 75 years to life, defendant appeals.

Defendant first contends the trial court erred, after finding a *Wheeler-Batson* violation (*People v. Wheeler* (1978) 22 Cal.3d 258; *Batson v. Kentucky* (1986) 476 U.S. 79), in employing the alternative remedy of seating the challenged juror with defendant's assent (see *People v. Willis* (2002) 27 Cal.4th 811 (*Willis*)). He argues the remedy sanctioned by *Willis* was not available because there were no extraordinary circumstances warranting the departure from the usual remedy of discharging the venire.

He next contends there was insufficient evidence of asportation for kidnapping and the instruction on asportation was incorrect. He challenges the aggravated assault conviction, contending there was insufficient evidence of force likely to cause great bodily injury, and the trial court erred in failing to define "likely." He argues that the three robbery convictions cannot stand because the court failed to instruct properly on robbery while resisting attempts to regain the property, there was only one continuous robbery of Cebotari, and there was instructional error as to multiple robberies of the same victim. Finally, he contends section 654 bars punishment for both the robbery of Cebotari and the kidnapping for robbery and adds that the abstract of judgment should be corrected.

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[1] Further undesignated statutory references are to the Penal Code.

We find merit in the last contention. We direct correction of the abstract and affirm.

FACTS

At about 11:30 p.m. on December 3, 2013, Anastassiya Cebotari parked to go to the condominium where she lived with her parents, grandmother, and brother. Defendant, wearing a blue puffer jacket and black and white Keds, approached her with a small black pistol and demanded money. She pulled out her wallet, took out the few dollars she had and gave it to him. He asked if that was all and if she had money in the residence. She said yes and he told her to take him there. She did because she was afraid he would take her somewhere else. They first remained in the parking lot about 15 minutes because she did not feel well. Defendant asked her who else lived with her and she told him. He also asked about weapons.

When they entered the condo, Cebotari's grandmother rose from the couch to see who was there. Defendant crouched down behind the couch and told Cebotari he would kill her if her grandmother saw him. Cebotari told her grandmother everything was okay and her grandmother lay back down.

They went to Cebotari's room where defendant told her to undress and tied her hands and legs. He walked around the room looking for money. He put a number of items in a pillowcase, including her laptop computer, phone, gold, and a box containing money. He went into her brother's room and the laundry. He took Russian toy cars from the hallway. She followed him by jumping, as her legs were tied.

They returned to her bedroom and he untied her, telling her to get dressed as she was going with him. He pointed his gun at her but when he turned away Cebotari ran to her parents' room, turned on the lights, and screamed, "[w]e're being robbed." Her father got up and went into the hallway. Cebotari heard her father fighting defendant. She ran to the balcony and screamed for help.

Cebotari's father, Alexander Filippov, at first thought his daughter was joking about being robbed until he saw how scared she was. He left his bedroom and went to his son's room and saw nothing. He turned and saw defendant, whose face was covered with a mask. Filippov yelled and jumped on him. Defendant took a boxer's stance and punched Filippov in the head "pretty hard" five or six times until Filippov was bleeding out of his ear. The fight continued. When Filippov realized defendant was not giving up, he pushed him out the door and locked it. He was "barely able" to push defendant outside through the door; it was "difficult."

Filippov sustained a cut on his ear that bled but did not hurt much. He sprained his shoulder and it was "really hurting" him. He went to the hospital for treatment, missed a few days of work, and by the time of trial still occasionally had pain. When the police arrived, an officer noted Filippov's left arm did not "look normal."

During the fight, Filippov ripped off defendant's mask and the hood of his jacket. He left them for the police. DNA from the hood was inconclusive, but DNA from the hat used as a mask matched defendant's profile.

The police executed a search warrant at a residence where defendant had been shortly after the robbery. Defendant fled, hopping fences, but was caught three houses away. In the search, officers found a Russian toy car, orange and black gloves, a replica black semiautomatic handgun, and a blue Old Navy jacket. Cebotari identified the toy car, the gloves, and the jacket. She testified the gun looked similar to the gun the robber used.

DISCUSSION

I

Alternate Remedy for Wheeler-Batson *Error*

Defendant contends the trial court erred in employing the alternate *Willis* remedy of seating the challenged prospective juror with defendant's consent rather than striking the venire once it found a *Wheeler-Batson* violation. He contends that such alternate

remedy is available only in extraordinary circumstances and there were none here. He further contends his consent to the practice does not constitute forfeiture of his appellate claim because he cannot waive rights of the community at large.

A. *Background*

Defendant is African-American. During voir dire, after the People excused two African-American jurors, the defense made a *Wheeler-Batson* motion. The prosecutor explained he excused the first juror, Mr. T., because T. had a son who had been convicted of murder and he thought the jury got it wrong. The prosecutor was concerned that T. would hold him to too high a standard. The prosecutor excused the second juror, Mr. D., because D. thought the officer who arrested him for driving under the influence acted inappropriately and in response to a question of whether he was treated fairly by the justice system, he said, "I was basically fed in a machine, and a machine does what a machine does."

The trial court denied the motion. The prosecutor then asked the court to hear peremptory challenges outside the presence of the jury. The next juror to be seated was an African-American woman, Juror No. 481. The prosecutor indicated he intended to excuse her; in response the defense stated it would then renew its *Wheeler-Batson* motion. The court stated that if hypothetically the motion were granted, they could keep Juror No. 481. The prosecutor stated that would be fine.

Juror No. 481's nephew had been convicted of murder about 30 years earlier. She felt he had not been treated fairly because he was 17 at the time and she believed they held him until he was 18 so they could try him as an adult. She thought the sentence of 27 years to life was harsh, but also understood someone had died, so she had mixed feelings. Later in the proceedings, Juror No. 481 came forward to say she had previously expressed bias against the criminal justice system, but in thinking about it she blamed her nephew's parents for how they raised him.

The trial court granted the second *Wheeler-Batson* motion and indicated that if the defense consented they would keep Juror No. 481. The defense responded, "That's fine." After a recess, the court announced that based on *Willis*, they would proceed with Juror No. 481 as a juror. The court asked the defense for consent and counsel stated, "This is our requested remedy to the granting of the motion." The court asked defendant if he agreed and he said "yes."

B. *The Law*

"In *People v. Wheeler* (1978) 22 Cal.3d 258, 276-277 . . . , we held that the use of peremptory challenges by a prosecutor to strike prospective jurors on the basis of group membership violates the right of a criminal defendant to trial by a jury drawn from a representative cross-section of the community under article I, section 16 of the California Constitution. Subsequently, in *Batson v. Kentucky* . . . , and its progeny, the United States Supreme Court held that such a practice violates, inter alia, the defendant's right to equal protection of the laws under the Fourteenth Amendment to the United States Constitution. African-Americans are a cognizable group for purposes of both *Wheeler* [citation] and *Batson* [citation]." (*People v. Alvarez* (1996) 14 Cal.4th 155, 192-193.)

In *Wheeler*, our Supreme Court set forth the remedy for the use of peremptory challenges to strike jurors on the ground of group bias: the court "must dismiss the jurors thus far selected. So too it must quash any remaining venire . . . . Upon such dismissal a different venire shall be drawn and the jury selection process may begin anew." (*Wheeler*, *supra*, 22 Cal.3d at p. 282.) The court noted that if experience proved this procedure ineffective to deter abuses, alternative penalties could be considered. (*Ibid.*, fn. 29.)

The United States Supreme Court declined to specify a remedy for a *Batson* violation. "In light of the variety of jury selection practices followed in our state and federal trial courts, we make no attempt to instruct these courts how best to implement our holding today. For the same reason, we express no view on whether it is more

appropriate in a particular case, upon a finding of discrimination against black jurors, for the trial court to discharge the venire and select a new jury from a panel not previously associated with the case, [citation], or to disallow the discriminatory challenges and resume selection with the improperly challenged jurors reinstated on the venire, [citation]." (*Batson v. Kentucky, supra,* 476 U.S. at p. 99, fn. 24.)

The California Supreme Court had an opportunity to consider the appropriateness of alternative remedies for a *Wheeler-Batson* violation in *Willis, supra,* 27 Cal.4th 811. There, counsel representing an African-American defendant first sought to dismiss the venire due to the lack of minorities among the prospective jurors. When that proved unsuccessful, counsel exercised his peremptory challenges to remove White males. After defense counsel had used 11 peremptory challenges, the prosecutor made a *Wheeler* motion. The court granted the motion, but questioned the remedy as dismissing the venire would reward defendant for making inappropriate challenges by giving him what he had originally asked for--a new venire. Instead, the court admonished counsel not to violate *Wheeler* and imposed monetary sanctions. (*Id.* at p. 815.) Defendant continued to use peremptory challenges to strike White males, the prosecution made another *Wheeler* motion, and the court again imposed sanctions (which were stayed and then lifted) and denied defendant's motion for a mistrial. On appeal after defendant's conviction, the court of appeal reversed and remanded for a new trial, concluding that under *Wheeler* the trial court erred in failing to quash the entire venire. (*Id.* at p. 816.)

The *Willis* court found, "[t]his case vividly demonstrates the need for the availability of some discretionary remedy short of dismissal of the remaining jury venire." (*Willis, supra,* 27 Cal.4th at p. 818.) "We think the benefits of discretionary alternatives to mistrial and dismissal of the remaining jury venire outweigh any possible drawbacks. As the present case demonstrates, situations can arise in which the remedy of mistrial and dismissal of the venire accomplish nothing more than to reward improper voir dire challenges and postpone trial. Under such circumstances, and with the assent of

the complaining party, the trial court should have the discretion to issue appropriate orders short of outright dismissal of the remaining jury, including assessment of sanctions against counsel whose challenges exhibit group bias and reseating any improperly discharged jurors if they are available to serve." (*Id.* at p. 821.)

In *Willis*, our Supreme Court stressed that "waiver or consent is a prerequisite to the use of such alternative remedies or sanctions, for *Wheeler* made clear that 'the complaining party is entitled to a random draw from an entire venire' and that dismissal of the remaining venire is the appropriate remedy for a violation of that right. [Citation.] Thus, trial courts lack discretion to impose alternative procedures in the absence of consent or waiver by the complaining party. On the other hand, if the complaining party does effectively waive its right to mistrial, preferring to take its chances with the remaining venire, ordinarily the court should honor that waiver rather than dismiss the venire and subject the parties to additional delay." (*Willis, supra*, 27 Cal.4th at pp. 823-824.)

In *People v. Overby* (2004) 124 Cal.App.4th 1237 at page 1243, the appellate court held: "The consent required by *Willis* . . . need not be personally given by defendant but may be granted by counsel." In *Overby*, defense counsel made a *Wheeler-Batson* motion immediately after the prosecution used a peremptory challenge to exclude the first African-American juror and asked the court to order the juror to remain in the courtroom. At sidebar, the court granted the motion and elected to reseat the excused juror rather than dismiss the entire panel. When the court asked if counsel wished to be heard, defense counsel said, "Submit" and the prosecutor objected. (*Id.* at pp. 1242-1243.) The challenged juror was reseated and voir dire continued. The prosecutor immediately made a *Wheeler-Batson* motion that was denied. Later, the prosecutor requested reconsideration of both motions and argued the entire venire should be dismissed. The trial court denied the motion for reconsideration. (*Id.* at p. 1243.) The appellate court found defense counsel consented to the alternate remedy by asking the

court to order the challenged juror to remain, submitting the matter without argument, and never indicating dissatisfaction with the remedy or asking the court to reconsider it. (*Id*. at pp. 1244-1245.) The *Overby* court emphasized that it is "preferable and advisable" for the record to reflect an express consent. (*Id.* at p. 1245.)

In *People v. Mata* (2013) 57 Cal.4th 178 (*Mata*), after the prosecution improperly used a peremptory challenge to discharge an African-American juror, the trial court reseated the juror without objection. Our Supreme Court agreed with *Overby* that the assent required by *Willis* may be given by defense counsel. (*Id.* at p. 185.) The court further held "that by failing to object to the trial court's proposed alternative remedy when the opportunity to do so arises, the complaining party impliedly waives the right to the default remedy of quashing the entire venire and impliedly consents to the court's proposed alternative remedy. 'Assent,' the term we used in *Willis*, encompasses positive agreement as well as passive concession." (*Id.* at p. 186.)

C. *Analysis*

Defendant contends there must be extraordinary circumstances to trigger the alternative remedy of *Willis* and there are no such circumstances here.[2] His argument focuses on the particular facts of *Willis*, where defendant was himself responsible for the multiple *Wheeler* violations that would have normally resulted in dismissal of the venire and the court's language "*Under such circumstances*" in sanctioning the alternative remedy of reseating any improperly discharged jurors. (*Willis, supra,* 27 Cal.4th at p. 821, italics added.) The focus of *Willis*, however, was the trial court's discretion to control jury selection and the need for the assent of the non-offending party before the alternative remedy was employed. The court authorized the use of the procedure of using sidebar conferences for peremptory challenges followed by disclosure in open court for

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[2] Because defendant challenges only the *remedy*, we do not consider the merits of the trial court's rulings on the two *Wheeler-Batson* motions.

successful challenges, but noted requiring all challenges at sidebar may be burdensome and "[t]rial courts should have discretion to develop appropriate procedures to avoid such burdens." (*Id.* at p. 822.) And, as discussed *ante*, *Willis* emphasized the need for *consent* to the alternative remedy. (*Id.* at pp. 823-824.) *Willis* did not establish any requirement of extraordinary circumstances.

As we have noted, use of the *Willis* remedy was upheld in *Mata, supra*, 57 Cal.4th 178, under circumstances quite different than those in *Willis*. Defendant argues that case too presented extraordinary circumstances as there the *Wheeler* motion was made in response to the excusal of *one* prospective juror rather than, as usual, after a *pattern* of using peremptory challenges based on group bias. As the *Mata* court was concerned with the issue of consent, it did not address the issue of what circumstances were necessary for the *Willis* remedy. In arguing the case presented extraordinary circumstances as seen in *Willis*, defendant relies primarily on the concurring opinion of Justice Baxter. Justice Baxter distinguished between a *Wheeler-Batson* motion granted only after a pattern of discriminatory excusals has emerged and one focused on the excusal of only one prospective juror, the "single juror" situation. (*Mata, supra*, 57 Cal.4th at p. 190 (conc. opn. of Baxter, J.).) He questioned why in the latter case "the complainant should have *any right at all* to quash the venire." (*Id.* at pp. 189-190.) Rather than limiting the *Willis* remedy to extraordinary cases like *Willis* or the "single juror" situation, we read Justice Baxter's concurrence to question whether the *Wheeler* remedy--quashing the venire--is ever appropriate in the "single juror" situation.

We find nothing in majority opinion in *Mata* limiting the *Willis* situation to cases presenting extraordinary circumstances.[3] In setting forth the parties' positions, the *Mata*

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[3] In a concurring opinion, Justice Werdegar, who disagreed with the majority's extension of *Willis* but found no miscarriage of justice, stated she agreed that the *Willis* remedy was appropriate based "on the unusual facts in that case," but noted there were "[n]o such

court described the People's position in part as: "The People interpret *Willis* as providing alternative remedies at the discretion of the trial court to further the court's interest in efficiently processing cases for trial." The court found the People's position "more persuasive." (*Mata, supra*, 57 Cal.4th at p. 185.)

While *Willis* spoke to the circumstances in the case before it, we find nothing in *Willis* or *Mata* to limit the trial court's discretion to fashion appropriate alternative remedies for a *Wheeler-Batson* violation to cases presenting "extraordinary circumstances." Defendant cites to no authority so limiting the *Willis* remedy. To the contrary, commentators have not read the case so narrowly. (See, e.g., 5 Witkin, Cal. Criminal Law (4th ed. 2012) Criminal Trial, § 601 ["a trial court, acting with the complaining party's assent, has discretion to impose remedies that are short of outright dismissal of the entire jury venire"]; Levinson, Cal. Criminal Procedure (Rutter 2018) § 20:32, p. 20-40 ["with the assent of the complaining party, the court has the discretion to issue other appropriate orders short of outright dismissal of the remaining jury"]; see also *People v. Singh* (2015) 234 Cal.App.4th 1319 [*Willis* remedy employed after several Caucasian jurors excused].)

Defendant recognizes that he consented to the remedy selected by the court. Indeed, counsel indicated it was "our requested remedy" and defendant expressly agreed to the procedure he now challenges on appeal. The People contend defendant has forfeited his contention by not objecting and affirmatively agreeing to it. Defendant rejects this argument, contending that despite his consent the trial court had no authority to depart from the remedy set forth in *Wheeler* and because the *Wheeler* remedy exists for the public benefit, he cannot waive it absent extraordinary circumstances. This argument is merely a restatement of his earlier argument that the *Willis* remedy is limited to cases

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unusual facts" in the case before the court. (*Mata, supra*, 57 Cal.4th at p. 195 (conc. opn. of Werdegar, J.).) Defendant does not rely on this concurring opinion to limit the *Willis* remedy to extraordinary or unusual cases.

presenting extraordinary circumstances, an argument we have rejected. Further, *Willis* recognized its alternative remedy was grounded in waiver. Where "the complaining party does effectively waive its right to mistrial, preferring to take its chances with the remaining venire, ordinarily the court should honor that waiver rather than dismiss the venire and subject the parties to additional delay." (*Willis, supra,* 27 Cal.4th at p. 824.)

Defendant contends it is against public policy not to limit the *Willis* remedy to cases of extraordinary circumstances. He contends widespread use of alternatives to the *Wheeler* remedy of quashing the venire would dilute the deterrent value of that remedy. He speculates counsel may be pressured to accept the *Willis* remedy as a compromise for fear the trial court will deny a meritorious *Wheeler-Batson* motion to avoid the burden of discharging the venire and beginning jury selection anew. We decline to entertain an argument based on speculation, especially when that speculation presupposes that both the trial court and defense counsel are willing to forego their professional and ethical duties for expedience.

The trial court did not err in employing, with defendant's express consent, the alternative *Willis* remedy of reseating the improperly challenged juror.

II

Sufficiency of Evidence of Asportation

Defendant contends there is insufficient evidence to sustain the kidnapping for robbery conviction because there is insufficient evidence of asportation. The evidence established that defendant moved Cebotari from the parking lot to the condo, an unspecified distance, and then into and throughout the condo. Defendant contends this movement was insubstantial and incidental to the robbery as he simply moved her to the location of additional valuables. Further, he argues the movement did not increase the risk of harm to her.

A. *The Law*

Section 209, subdivision (b)(1) provides that "[a]ny person who kidnaps or carries away any individual to commit robbery . . . shall be punished by imprisonment in the state prison for life with the possibility of parole." Aggravated kidnapping is committed only "if the movement of the victim is beyond that merely incidental to the commission of, and increases the risk of harm to the victim over and above that necessarily present in, the intended underlying offense." (§ 209, subd. (b).) The statute previously required that the movement *substantially* increase the risk of harm to a victim, but it was amended in 1997 to require only that the movement increase the risk of harm, omitting "substantially."[4] (*People v. Robertson* (2012) 208 Cal.App.4th 965, 982 (*Robertson*).)

"The jury considers both whether the movement was more than merely incidental to a crime and whether there was an increased risk of harm to the victim. As to whether the movement was more than merely incidental to the commission of the crime, 'the jury considers the "scope and nature" of the movement, which includes the actual distance a victim is moved. [Citations.] There is, however, no minimum distance a defendant must move a victim to satisfy . . . ' this element. [Citation.] As to whether the movement increased a victim's risk of harm, the jury considers ' " 'such factors as the decreased likelihood of detection, the danger inherent in a victim's foreseeable attempts to escape, and the attacker's enhanced opportunity to commit additional crimes. [Citations.] The fact that these dangers do not in fact materialize does not, of course, mean that the risk of harm was not increased.' " ' [Citations.] 'There is no rigid "indoor-outdoor" rule by which moving a victim inside the premises in which he is found is never sufficient asportation for kidnapping for robbery while moving a victim from inside to outside (or the reverse) is *always* sufficient. [Citation.] Nonetheless, it has often been held that

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[4] In Part III, *post*, we address defendant's argument that the requirement that the movement *substantially* increase the risk of harm remains.

defendants who have moved their victims within the premises in which they were found did not increase the risk to the victims [citations].' [Citation.] Simply stated, 'the movement must be more than incidental *and* must increase the inherent risk of harm.' [Citation.] [Citation.] Application of the foregoing factors in a particular case 'will necessarily depend on the particular facts and context of the case.' [Citation.]" (*People v. Simmons* (2015) 233 Cal.App.4th 1458, 1471-1472 (*Simmons*).)

The two elements of the asportation element (movement that is not merely incidental to the crime and that increases the risk of harm to the victim) "are not distinct, but interrelated, because a trier of fact cannot consider the significance of the victim's changed environment without also considering whether that change resulted in an increase in the risk of harm to the victim." (*People v. Martinez* (1999) 20 Cal.4th 225, 236 (*Martinez*).) Thus, although defendant discusses the elements separately, we will consider them together.

B. *Analysis*

Defendant contends his moving Cebotari was incidental to the robbery as he was simply moving her to the location of additional property to steal. "[I]ncidental movements are brief and insubstantial, and frequently consist of movement around the premises where the incident began. [Citations.] By contrast, relatively short distances have been found not to be incidental where the movement results in a substantial change in 'the context of the environment.' [Citations.]" (*People v. Diaz* (2000) 78 Cal.App.4th 243, 247.) For example, in *People v. Jones* (1999) 75 Cal.App.4th 616, the defendant moved the victim 40 feet in a parking lot from her boyfriend's truck to her car where he pushed her inside; when she started the car, the alarm sounded. The appellate court found this distance was not insubstantial and the movement increased the risk of harm to the victim as she was no longer in public view. (*Id*. at pp. 629-630.)

This case is similar to *Simmons, supra,* 233 Cal.App.4th 1458. There, two defendants were convicted of a number of felonies arising from a dozen home invasion

robberies. On appeal, they challenged the sufficiency of the evidence to support their convictions for two counts of kidnapping for robbery. In the first incident, two boys were walking up the stairs to a house when one defendant pointed a gun at them and demanded money. The second defendant joined them and discussed going into the house to get money. They went in the house and the defendants held the occupants at gunpoint; one defendant stayed with them while the other collected jewelry, money, and other valuables. (*Id*. at pp. 1469-1470.) In the second incident, a man returned home from a fishing trip with his two young daughters. When he got out of the car, defendant held a gun to his head, took his wallet, and ordered the older daughter out of the car, leaving the younger one asleep in the car. Another man joined defendant and they went inside the house, ordered the family members into the kitchen at gunpoint, and took jewelry. (*Id.* at pp. 1470-1471.)

On appeal defendants argued the movement of the victims was incidental to the robberies and did not increase the victims' risk of harm. The appellate court disagreed. (*Simmons, supra,* 233 Cal.App.4th at p. 1471.) The movement of the first incident "decreased the likelihood the defendants would be detected and increased the victims' risk of harm. It allowed the defendants to engage in additional and more dangerous crimes by hiding their victims from public view and providing access to additional victims, and it increased the possibility of something going awry and somebody getting hurt." (*Id.* at p. 1472.) In the second incident, "The victim was moved from his driveway, up his front stairs, and into his home. Once again, this movement provided Simmons with new opportunities to engage in additional and more dangerous crimes out of public view, and it increased the possibility of something going awry." (*Ibid.*)

The same is true here. In moving Cebotari from the parking lot to her family's condo, defendant moved her from public view, increased his opportunity to commit new crimes, and "increased the possibility of something going awry." Indeed. defendant *did* commit additional crimes against Filippov and something *did* go awry--Filippov attacked

defendant in an attempt to protect his family and defendant seriously injured Filippov while both were inside the condo, out of public view.

Defendant attempts to distinguish *Simmons*. First, he contends the movement in *Simmons* was intended to permit the robbery of additional individuals, but here defendant intended to rob *only* Cebotari. The *Simmons* court noted the rule that a defendant may be convicted of kidnapping for robbery where the kidnapping and the robbery pertain to different victims. (*Simmons, supra,* 233 Cal.App.4th at p. 1471.) In the first incident in *Simmons,* the boys apparently were not robbed, but in the second incident the man, a victim of the kidnapping, was robbed of his wedding ring. The opinion does not indicate from whom the other property was taken. (*Id*. at pp. 1470-1471.) Here, there is no evidence that once defendant knew there were others in the condo, he still intended to rob only Cebotari. After Filippov confronted him, defendant did not hesitate to use force to complete the robbery. As in *Simmons*, the presence of others gave defendant the opportunity to commit additional crimes.

Next, defendant argues that in *Simmons*, all the victims were held at gunpoint while here defendant's gun was only a replica and he attempted to complete the robbery while the others were sleeping. First, it was not established the gun used was a replica. Cebotari testified only that the replica gun found in the search two months after the robbery was similar to the gun used in the robbery. Second, the danger defendant posed, a danger that increased inside the condo, was not simply the threat of a gunshot, as evidenced by Filippov's injuries.

There is substantial evidence of asportation to sustain the conviction for aggravated kidnapping.

III

Instructional Error: Asportation for Kidnapping

Defendant contends there were two errors in the instruction on aggravated kidnapping. First, the instruction did not require that the movement of the victim

substantially increase the risk to the victim. Second, the instruction stated the movement must be more than merely "incidental to *a* robbery," instead of more than "incidental to *the* robbery."

A. *Risk Prong*

The trial court instructed the jury on aggravated kidnapping in the language of CALCRIM No. 1203. The instruction told the jury the victim had to be moved a "substantial distance" and defined substantial distance in a manner that mirrored the language of subdivision (b)(2) of section 209: "This subdivision shall only apply if the movement of the victim is beyond that merely incidental to the commission of, and increases the risk of harm to the victim over and above that necessarily present in, the intended underlying offense."[5]

Defendant contends the instruction misstated the risk prong, arguing the movement must *substantially* increase the risk of harm. Despite the absence of the word

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[5] The entire instruction read: "The defendant is charged in Count 3 with kidnapping for the purpose of robbery in violation of Penal Code section 209(b). [¶] To prove that the defendant is guilty of this crime, the People must prove that: [¶] 1. The defendant intended to commit robbery; [¶] 2. Acting with that intent, the defendant took, held, or detained another person by using force or by instilling a reasonable fear; [¶] 3. Using that force or fear, the defendant moved the other person or made the other person move a substantial distance; [¶] 4. The other person was moved or made to move a distance beyond that merely incidental to the commission of a robbery; [¶] 5. When that movement began, the defendant already intended to commit robbery; [¶] AND [¶] 6. The other person did not consent to the movement. [¶] As used here, *substantial distance* means more than a slight or trivial distance. The movement must have increased the risk of physical or psychological harm to the person beyond that necessarily present in the robbery. In deciding whether the movement was sufficient, consider all the circumstances relating to the movement. [¶] To be guilty of kidnapping for the purpose of robbery, the defendant does not actually have to commit the robbery. [¶] To decide whether the defendant intended to commit robbery, please refer to the separate instructions that I will give you on that crime."

"substantially" from section 209, he contends the history of aggravated kidnapping shows the requirement of a *substantial* increase remains.

In *People v. Daniels* (1969) 71 Cal.2d 1119, at page 1139, our Supreme Court held that asportation for purposes of kidnapping for robbery must be substantial, that is, the movement cannot be merely incidental to the commission of the robbery and must "substantially increase the risk of harm over and above that necessarily present in the crime of robbery itself." In *People v. Rayford* (1994) 9 Cal.4th 1, at page 20, our Supreme Court held the test for asportation announced in *Daniels* applied to kidnapping for rape, then in section 208, subdivision (d). In 1997 section 209 was rewritten to include kidnapping for rape as part of aggravated kidnapping, but the requirement of a substantial increase in the risk of harm was not expressly stated.

Nonetheless, defendant contends the amended section 209 includes the substantial increase requirement. He bases this assertion on an uncodified section of the Assembly Bill that amended section 209. "It is the intent of the Legislature in enacting this act that the two-prong test of asportation for kidnapping, as set forth in *People v. Daniels*, 71 Cal.2d 1119, 1139, be applied to violations of subdivision (b) of Section 209 of the Penal Code, as amended by this act, pursuant to the decision of the California Supreme Court in *People v. Rayford*, 9 Cal.4th 1, 20." (Stats. 1997, ch. 817, § 17.) He cites to subsequent cases that repeated the substantial increase in the risk of harm test without discussion.

In *Robertson, supra,* 208 Cal.App.4th 965, the appellate court squarely addressed whether aggravated kidnapping required a substantial increase in the risk of harm and determined it did not. It found "the omission of the word 'substantial' from that subdivision [(b)(2) of section 209]" was "both significant and intentional." (*Id*. at pp. 982, 980.) Quoting the same uncodified section of the statute as defendant, the *Robertson* court stressed that the *Daniels* test was to apply to "violations of subdivision (b) of Section 209 of the Penal Code, *as amended by this act*." It found the 1997

amendment to section 209 modified the *Daniels* test for asportation by removing the substantial increase in risk of harm test. (*Id.* at p. 980.)

The *Robertson* court relied on two California Supreme Court cases that acknowledged the modified asportation standard. (*Robertson, supra,* 208 Cal.App.4th at p. 980.) In *Martinez, supra,* 20 Cal.4th 225, at page 232, the court noted section 209, subdivision (b)(2) codifies "a modified version" of the *Daniels* asportation standard. (*Martinez,* at p. 232, fn. 4.) "Unlike our decisional authority, it does not require that the movement 'substantially' increase the risk of harm to the victim." (*Ibid.*) More than a decade later our Supreme Court noted: "In 1997, the Legislature revised the statute to define aggravated kidnapping as kidnapping to commit robbery or certain sex offenses, and modified the asportation standard by eliminating the requirement that the movement of the victim 'substantially' increase the risk of harm to the victim." (*People v. Vines* (2011) 51 Cal.4th 830, 869, at fn. 20, overruled on another point in *People v. Hardy* (2018) 5 Cal.5th 56, 104.) The *Robertson* court also cited to several appellate court decisions that acknowledged the Legislature's modification of the asportation standard. (*Robertson,* at p. 981.)

The *Robertson* court also found "particularly well reasoned" the decision in *People v. Ortiz* (2002) 101 Cal.App.4th 410. At issue in *Ortiz* was whether the asportation requirement for kidnapping for carjacking (§ 209.5) required movement that substantially increased the risk of harm. Noting that the language of section 209.5 tracked that of the 1997 version of section 209, the court relied on *Martinez* to find the movement need not *substantially* increase the risk of harm. (*Ortiz,* at p. 415.)

Defendant contends *Robertson* and cases following it are incorrect. He faults *Robertson* for relying on Supreme Court dicta and argues that dicta did not decide whether the amended section 209, subdivision (b)(1) displaced the earlier decisional authority (*Daniels*). But the *Daniels* court was *interpreting the former statute* when it decided the asportation test. (*People v. Daniels, supra,* 71 Cal.2d at p. 1139 ["we hold

that the intent of the Legislature . . . ."].) Thus, the amended statute *must* displace the prior decisional authority interpreting the former statute.

In *People v. Nguyen* (2000) 22 Cal.4th 872, our Supreme Court indicated *Daniels* found the requirement that the movement substantially increase the risk of harm to the victim was "implicit in the history of section 209." (*Id*. at p. 877.) Defendant relies heavily on *Nguyen's* statement that: "In 1997, the Legislature made this implicit requirement explicit . . . ." (*Id.* at p. 878.) This statement, however, like those from *Martinez* and *Vines* quoted in *Robertson*, was not necessary to the disposition of the case. The issue in *Nguyen* was whether " 'whether the risk of harm required to elevate kidnapping to aggravated kidnapping may be a risk of *psychological* harm.' " (*Id.* at p. 874.) Further, in *Nguyen*, the defendant committed his crime in 1995, before the 1997 amendment. (*Id.* at p. 877.)

In sum, the only case to directly decide whether the "substantially increase the risk of harm" test from *Daniels* survives the amendment of section 209 is *Robertson*, which, after careful analysis, determined it did not. (*Robertson, supra*, 208 Cal.App.4th at p. 980.) Defendant's attempt to discredit *Robertson* by relying on snippets of dicta and dissenting opinions fails. We find the reasoning of *Robertson* persuasive and follow it, finding no error in CALCRIM No. 1203's instruction on the risk prong of aggravated kidnapping.

B. *The Incidental Prong*

Next, defendant contends the instruction was error because it required movement "beyond that merely incidental to *a* robbery" rather than "*the* robbery." Defendant argues that in determining whether the movement was merely incidental, the jury must consider the robbery intended, not a generic robbery such as a standstill robbery that does not require any movement at all. He argues the instruction eliminated the incidental prong of asportation by allowing the jury to find *any* movement satisfied it.

First, defendant asserts this court approved a version of CALCRIM No. 1203 that used the term "the robbery" in *People v. Curry* (2007) 158 Cal.App.4th 766, at pages 781-782, suggesting that we have found that is the only proper formulation of the instruction. That portion of the instruction was not at issue in *Curry*. " 'It is axiomatic that cases are not authority for propositions not considered.' " (*In re Marriage of Cornejo* (1996) 13 Cal.4th 381, 388.)

In reviewing a claim of instructional error, we "must assess the instructions as a whole, viewing the challenged instruction in context with other instructions, in order to determine if there was a reasonable likelihood the jury applied the challenged instruction in an impermissible manner." (*People v. Wilson* (2008) 44 Cal.4th 758, 803.) In making this determination, we presume jurors are "intelligent and capable of understanding and applying the court's instructions." (*People v. Gonzales* (2011) 51 Cal.4th 894, 940.)

The kidnapping instruction told the jury that to be guilty of kidnapping for robbery, defendant had to intend to commit a robbery, and using force or fear move his victim "a substantial distance" that was not "merely incidental to the commission of a robbery." Substantial distance was defined as "more than a slight or trivial distance." And the movement increased the risk of harm "beyond that necessarily present in *the* robbery." The jury was to consider all circumstances relating to the movement in deciding if the movement was sufficient. Thus, the instruction focused the jury on the particular robbery at hand, not some hypothetical or generic robbery. Considering these instructions as a whole, there is no reasonable likelihood a juror would have found that *any* movement was sufficient for kidnapping for robbery.

There was no instructional error as to kidnapping for robbery.

IV

Sufficiency of the Evidence of Aggravated Assault

The jury found defendant guilty in count 6 of aggravated assault, specifically assault "by any means of force likely to produce great bodily injury" (§ 245, subd. (a)(4))

on Filippov. Defendant contends there is insufficient evidence he used "force likely to produce great bodily injury" because the evidence established only that he and Filippov exchanged blows. He argues testimony that he hit Filippov "pretty hard" was insufficient to show the necessary force and there was no evidence he caused Filippov's sprained shoulder. Defendant contends his conviction must be reversed or reduced to simple assault.

"Great bodily injury is bodily injury which is significant or substantial, not insignificant, trivial or moderate." (*People v. Covino* (1980) 100 Cal.App.3d 660, 668.) It is "well established" that "the use of hands or fists alone may support a conviction of assault 'by means of force likely to produce great bodily injury.' " (*People v. Aguilar* (1997) 16 Cal.4th 1023, 1028.) The statute focuses on the force used, not whether the victim suffers any harm. (*Ibid*.) While the injuries suffered are not conclusive, they are often indicative of the force used. (*People v. Muir* (1966) 244 Cal.App.2d 598, 603.) "[T]he question of whether or not the force used was such as to have been likely to produce great bodily injury, is one of fact for the determination of the jury based on all the evidence, including but not limited to the injury inflicted." (*Id.* at p. 604.)

In reviewing a claim of insufficient evidence, "the court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence that is, evidence which is reasonable, credible, and of solid value such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Johnson* (1980) 26 Cal.3d 557, 578.)

Filippov, who was six feet three inches tall, testified that defendant was big and about his size. Defendant assumed a boxer's stance and then hit him "pretty hard" five or six times in the head and the fight continued. Filippov "was barely able to push him out of the house and lock the door. It was difficult." Filippov pushed defendant out the door only when he "realized he was not going to give up." Filippov suffered a cut ear that bled and a sprained shoulder that hurt and continued to hurt intermittently. He went to

the hospital for his shoulder and was unable to work for a few days. From this evidence the jury could reasonably conclude that there was a ferocious fight between two large men during which defendant used a significant amount of force that was likely to cause great bodily injury.

V

Failure to Define "Likely"

The trial court instructed the jury on aggravated assault in the language of CALCRIM No. 875. Part of that instruction told the jury that to prove the crime, the People had to prove "[t]he force used was likely to produce great bodily injury." In this context, the term "likely" means " ' "probable or . . . more probable than not." ' " (*People v. Russell* (2005) 129 Cal.App.4th 776, 787.) Noting that "likely" can have other meanings, defendant contends the trial court had a duty sua sponte to define "likely" and erred to failing to do so. Defendant did not request amplification or clarification of this instruction at trial.

"The rules governing a trial court's obligation to give jury instructions without request by either party are well established. 'Even in the absence of a request, a trial court must instruct on general principles of law that are . . . necessary to the jury's understanding of the case.' [Citations.] That obligation comes into play when a statutory term 'does not have a plain, unambiguous meaning,' has a 'particular and restricted meaning' [citation], or has a technical meaning peculiar to the law or an area of law [citations]." (*People v. Roberge* (2003) 29 Cal.4th 979, 988.)

In *Roberge*, our Supreme Court held a trial court must instruct sua sponte on "the unique meaning that the SVPA [Sexually Violent Predators Act] assigns to the term 'likely.' " (*People v. Roberge, supra,* 29 Cal.4th at p. 989.) Under the SVPA, "a person is 'likely [to] engage in sexually violent criminal behavior' if at trial the person is found to present a *substantial danger,* that is, a *serious and well-founded risk,* of committing such crimes if released from custody." (*Id*. at p. 988.) The court found "likely" did not

have a plain or unambiguous meaning in the SVPA because "[n]ot all of these dictionary definitions of 'likely' are consistent with the particular and technical meaning the SVPA assigns that term." (*Ibid.*)

Here the definition of "likely," probable or more probable than not, is the "ordinary usage." (*People v. Savedra* (1993) 15 Cal.App.4th 738, 744.) Since defendant did not request amplification of clarification, the trial court had no obligation to define sua sponte the term. "A trial court has no sua sponte duty to give amplifying or clarifying instructions in the absence of a request where the terms used in the instructions given are 'commonly understood by those familiar with the English language.' " (*People v. Kimbrel* (1981) 120 Cal.App.3d 869, 872, italics omitted.) Defendant's contention fails.

VI

Instruction on Estes *Robbery*

Count 5 charged defendant with first degree robbery of Filippov, based on his confrontation with Filippov *after* he had taken property in the condominium. "[R]obberies in which the victim only comes upon the defendant after the latter has gained possession of the stolen property are commonly referred to as '*Estes* robberies.' " (*Miller v. Superior Court* (2004) 115 Cal.App.4th 216, 223.) Defendant asserts it is "questionable" that he was guilty of an *Estes* robbery.

In *People v. Estes* (1983) 147 Cal.App.3d 23, a department store security guard tried to stop the defendant who was leaving the store without paying for items of clothing. When the guard attempted to detain him, the defendant pulled out a knife, swung it at the guard, and threatened to kill him. In upholding a conviction for robbery, the court stated: "The crime of robbery is a continuing offense that begins from the time of the original taking until the robber reaches a place of relative safety. It is sufficient to support the conviction that appellant used force to prevent the guard from retaking the property and to facilitate his escape. The crime is not divisible into a series of separate acts. Defendant's guilt is not to be weighed at each step of the robbery as it unfolds. The

events constituting the crime of robbery, although they may extend over large distances and take some time to complete, are linked by a single-mindedness of purpose. [Citation.] Whether defendant used force to gain original possession of the property or to resist attempts to retake the stolen property, force was applied against the guard in furtherance of the robbery and can properly be used to sustain the conviction." (*Id*. at p. 28.)

We do not construe defendant's claim as insufficiency of the evidence. In any event, such a claim fails. The jury could reasonably conclude that after Cebotari told Filippov there was a robbery, he left his bedroom to stop it, that is, to prevent defendant from taking their property and regain possession of it. When Filippov jumped on defendant, defendant immediately assumed a boxer's stance, expecting a fight. Filippov testified he tried to push defendant out the door only when he "realized that he was not going to give up."

Defendant's true contention is instructional error. He contends the trial court erred in failing to instruct sua sponte on the mental state required for an *Estes* robbery. He contends the court should have instructed the jury it had to find that defendant used force to prevent Filippov from retaking the property and to facilitate his escape. He argues the jury could have found defendant used force only to protect himself from harm, an unlawful attempt at self-defense. He claims the evidence shows defendant *resisted* Filippov's attempt to eject him, the opposite of trying to escape.

Defendant contends the court should have given the additional instruction approved in *People v. Anderson* (2011) 51 Cal.4th 989, at page 999: " 'The use of force or fear can occur with the initial taking of the property, or it can occur while the defendant attempts to get away with the stolen property.' " In addition, he contends the court should have instructed on the legal definition of "taking" and its two aspects. "California courts have construed the taking element of robbery to include two necessary

elements: caption or gaining possession of the victim's property, and asportation or carrying away the loot." (*People v. Lopez* (2003) 31 Cal.4th 1051, 1056.)

In criminal cases, the court must instruct sua sponte " 'on the general principles of law governing the case, i.e., those principles relevant to the issues raised by the evidence, but need not instruct on specific points developed at trial. "The most rational interpretation of the phrase 'general principles of law governing the case' would seem to be . . . those principles of law commonly or closely and openly connected with the facts of the case before the court." ' " (*People v. Michaels* (2002) 28 Cal.4th 486, 529–530.)

The People contend defendant has forfeited this contention by failing to request an amplifying instruction. "Generally, a party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language." (*People v. Andrews* (1989) 49 Cal.3d 200, 218; see *People v. Kimble* (1988) 44 Cal.3d 480, 503 [instructions are required sua sponte as to the principles of law openly and closely related to the evidence; instructions amplifying an element of an offense are required only upon a request].)

Thus, the question is whether the additional instructions that defendant claims were necessary were required to be given sua sponte.

In *People v. Bolden* (2002) 29 Cal.4th 515, defendant challenged the pattern robbery instruction given to his jury. He contended the court should have instructed that theft must be the motive for the application of force and the victim must be aware of the taking, not unconscious or inebriated. Our Supreme Court found the pattern instruction adequately explained that defendant must form the intent to steal before or during the application of force and the force or fear must be used to accomplish the taking. (*Id*. at pp. 556-557.) "If defendant thought the point needed additional clarification or explanation, defendant should have 'requested appropriate clarifying or amplifying

language' [citation]; absent such a request, the point is not preserved for appellate review." (*Id.* at p. 557.)

The same is true here. The trial court instructed the jury on robbery using the language of CALCRIM No. 1600. The instruction told the jury that the People had to prove "defendant used force or fear to take the property or to prevent the person from resisting;" when defendant used force or fear, he intended to deprive the person of the property permanently; and his "intent to take the property must have been formed before or during the time he used force or fear." The instruction thus adequately informed the jury that robbery required an intent to steal; defendant had to use force or fear for the purpose of taking the property. If he used force for another reason, it was not robbery.

Since the instructions given adequately covered "the general principles of law governing the case" concerning the motive for the use of force and defendant did not request an amplifying or clarifying instruction, he has forfeited the issue on appeal. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1140.)

VII

The Number of Robberies of Cebotari

A. *Defendant's Contention*

Defendant contends it was error to convict him of two robberies of Cebotari. He contends there was only one robbery because the robbery in the parking lot was not complete until he left the condominium for a place of temporary safety. He argues it does not matter that he took additional items in the condominium because all the takings were part of a single plan to rob Cebotari. Further, he contends that under the rule of *People v. Pearson* (1986) 42 Cal.3d 351, 355, overruled on another point in *People v. Vidana* (2016) 1 Cal.5th 632, 651, multiple convictions cannot be based on necessarily included offenses and second degree robbery is a lesser included offense to first degree robbery.

Defendant reasons as follows: Robbery is a continuing offense; it is not complete upon taking of the loot. (*People v. Gomez* (2008) 43 Cal.4th 249, 254, 255.) The asportation, taking away, element of robbery continues " 'as long as the loot is being carried away to a place of temporary safety.' " (*Id.* at p. 256.) "The scene of a robbery is not a place of temporary safety, even if it is the victim and not the robber who attempts to escape." (*People v. Ramirez* (1995) 39 Cal.App.4th 1369, 1375.) "In cases involving a kidnapping and robbery, courts have held almost without exception that the evidence supported the conclusion the robber had not reached a place of temporary safety so long as the victim remained under the robber's control." (*People v. Carter* (1993) 19 Cal.App.4th 1236, 1251.) " 'When a defendant steals multiple items during the course of an indivisible transaction involving a single victim, he commits only one robbery or theft notwithstanding the number of items he steals.' . . . 'We find no authority for the proposition that a robber may be charged with and convicted of a separate robbery, or an additional offense of grand theft, because he or she took more than one item from a solitary victim during a single course of conduct.' " (*People v. Ortega* (1998) 19 Cal.4th 686, 699 (*Ortega*).) Thus, defendant argues his robbery of Cebotari was one continuing offense from the time he accosted her in the parking lot through their time in the condo.

B. *Analysis*

There is a distinction between when a crime is committed and when it is complete. "In the case of robbery, for example, the crime is committed -- as distinct from a mere attempt -- when the defendant removes the victim's property. [Citations.] The robbery continues, however, until the robber has escaped with his loot to a place of temporary safety. [Citations.] Once the defendant has reached a place of temporary safety, the robbery is at an end. [Citation.]" (*People v. Bigelow* (1984) 37 Cal.3d 731, 753–754.)

The duration of a robbery is significant for determining certain ancillary consequences of robbery. (See, e.g., *People v. Boss* (1930) 210 Cal. 245, 250-251 [felony murder]; *People v. Carroll* (1970) 1 Cal.3d 581, 584-585 [great bodily injury in

commission of robbery]; *People v. Laursen* (1972) 8 Cal.3d 192, 199-200 [kidnapping for the purpose of robbery]; *People v. Johnson* (1992) 5 Cal.App.4th 552, 559-560 [robbery-murder special circumstance].) The duration of a robbery is also significant in determining the period within which all elements must be satisfied (see *People v. Gomez, supra,* 43 Cal.4th at p. 258 ["If the aggravating factors are in play at any time during the period from caption through asportation, the defendant has engaged in conduct that elevates the crime from simple larceny to robbery"]) and in determining the liability of an aider and abettor (*People v. Cooper* (1991) 53 Cal.3d 1158, 1169-1170). For purposes of establishing guilt of the perpetrator, however, we need not look to the *completion* of the robbery; the asportation aspect of robbery is initially satisfied by evidence of slight movement. (*Id.* at p. 1165.)

Here defendant twice separately satisfied the elements of robbery during his interactions with Cebotari. He first took money from her at gunpoint in the parking lot. Next, in the condominium, he applied force by tying her up and took additional items. However, these two separate takings by force may only result in one robbery conviction if the both takings occurred during the course of one indivisible transaction. " 'When a defendant steals multiple items during the course of an *indivisible transaction* involving a single victim, he commits only one robbery or theft notwithstanding the number of items he steals.' " (*Ortega, supra,* 19 Cal.4th at p. 699, italics added.) The question, then, is whether the two takings occurred within an indivisible transaction. If so, they count only as one robbery.

In many of the cases on which defendant relies, there was only one carrying away, so there was an indivisible transaction and only one robbery. In *Ortega,* the defendants robbed two teenagers and drove off with the van of one of the teens. The theft of the van was part of the one and only robbery. (*Ortega, supra,* 19 Cal.4th at p. 699.) In *People v. Brito* (1991) 232 Cal.App.3d 316, defendant, posing as a hitchhiker, pointed a gun at a driver and demanded money and gold. The driver fled and defendant left with the car.

(*Id.* at p. 320.) Defendant challenged the sufficiency of the evidence of robbery; he contended he did not use force or fear to take the car and formed the intent to take it only after the victim fled. (*Id*. at p. 325.) In rejecting this argument, the court explained: "Brito attempted to commit a *robbery* and during the course of events stole the vehicle. We know of no requirement that a robber's intent to steal must be directed towards items he has identified at the time he applies the force, as opposed to items he identifies during the same transaction." (*Id*. at pp. 325-326.) In *People v. Escobar* (1996) 45 Cal.App.4th 477, defendants robbed a man in a truck, drove off with him for five blocks, released him and took the truck. The court found the taking of the truck was part of the robbery. (*Id.* at p. 482.) In *People v. Marquez* (2000) 78 Cal.App.4th 1302 (*Marquez*), in "one seamless ill-conceived effort," defendant robbed a waitress of both her tips and money from the cash drawer. (*Id*. at p. 1307.) This court reversed one of two convictions for robbery because there was only one threatened application of force, although the property taken was owned by different persons. (*Id*. at p. 1308.)

Defendant contends this case is similar to *People v. Haynes* (1998) 61 Cal.App.4th 1282, where a robbery consisted of two encounters. In the first, a teenage robber struggled with the victim in a parking lot through the victim's open car window. The robber took some of the victim's cash and the bills tore in half as the victim drove away. The defendant arrived and kicked the victim's car. The defendant, with the robber as his passenger, followed the victim for several blocks and brought him to a stop where the robber struggled with the victim a second time and took the rest of the cash. The defendant then drove the robber away. (*Id.* at p. 1286.) On appeal, the defendant contended there were two robberies and insufficient evidence he was guilty as to either. (*Id.* at p. 1291.) The court rejected the argument that there were two robberies, finding he had not reached a temporary place of safety before the second encounter. (*Id.* at p. 1293.)

The People contend that *Haynes* is distinguishable because it involved "the single objective of stealing the victim's recently cashed paycheck." But robbery requires an

intent to steal, not an intent to steal a particular item. (See *Ortega, supra*, 19 Cal.4th at p. 699.) Instead, we find the distinguishing fact in *Haynes* is that it involved an aider and abettor, not the direct perpetrator. The court noted there could be two robberies: "one robbery arguably occurred at the parking lot, once the robber carried away half the victim's money, and a second one arguably occurred after the pursuit, once the robber carried away the rest. This is so because a robbery is 'initially' committed for guilt purposes by any slight movement of the loot." (*People v. Haynes, supra*, 61 Cal.App.4th at p. 1290.) The court found, however, that "since defendant was prosecuted as an aider and abettor and not as a direct perpetrator, the first act melded into the second." (*Ibid*.)

Here, unlike Hayes, defendant was a direct perpetrator. His two takings from Cebotari were not an indivisible transaction; the efforts were not "seamless" as in *Marquez, supra,* 78 Cal.App.4th at page 1307. The robbery in the condominium was not a spontaneous act in response to Cebotari's lack of sufficient cash or defendant's realization that other property was available, as in *Ortega*, *Brito*, and *Escobar*. Instead, defendant considered an alternate source of loot and made a plan, asking Cebotari whether she had money in her house and about who lived with her and the presence of weapons. The scene changed dramatically from a parking lot, visible to the public or at least to the residents of the 15-building complex, to the inside of a private residence at a time when its occupants had retired for the night. There was a 15 minute lapse or break as they waited in the parking lot for Cebotari to feel better. During that time, defendant could have reconsidered his plan, but instead renewed his intent to steal. Finally, defendant's method of employing force or fear changed. (See *People v. Jaska* (2011) 194 Cal.App.4th 971, 985 [employing a single method to commit thefts shows single intent or scheme].) While he used a pistol to secure Cebotari's compliance in the parking lot, he made her undress and tied her up in the condominium.

Instead, we find this case closer to *People v. Porter* (1987) 194 Cal.App.3d 34, which addressed the issue of multiple robbery convictions in the context of sentencing.

Defendant and an accomplice rapidly approached a victim in a parking lot. The victim jumped in his car and locked the front door, but defendant jumped in the back seat, held a knife to the victim's throat and unlocked the passenger door for his accomplice. The accomplice rummaged through the victim's wallet but found only a small amount of cash. Insisting the victim must have more money, the robbers examined the victim's credit cards. Believing one was an ATM card, defendant forced the victim at knifepoint to drive to a bank. The victim tried to explain the card was a credit card not an ATM card. When defendant put the knife down to examine the card, the victim jumped out of the car. The defendant was convicted of robbery and kidnapping for the purpose of robbery and received concurrent sentences. (*Id*. at pp. 36-37.)

On appeal, the defendant challenged the concurrent sentences because a defendant cannot be punished for both kidnapping for the purpose of robbery and the underlying robbery. (*People v. Milan* (1973) 9 Cal.3d 185, 197.) In upholding the sentences, the *Porter* court implicitly found two crimes related to robbery, a robbery and an attempted robbery. "A reasonable inference from the record is that appellant and his companion initially planned only to rob the victim of the contents of his wallet, but thereafter came up with a new idea: kidnapping the victim to his bank to compel him to withdraw money from his account by means of what they thought was an automated teller card. [Citations.] In this case the record suggests that appellant was convicted of the robbery of the victim's wallet and of kidnapping for the purpose of a different robbery involving the compelled withdrawal of funds from an automated teller, which was unsuccessful. This is not, therefore, a case of punishing appellant for kidnapping for the purpose of robbery and for committing 'that very robbery.' [Citation.] Nor is this a case of multiple punishment for taking several items during the course of a robbery. [Citation.] What began as an ordinary robbery turned into something new and qualitatively very different. No longer satisfied with simply taking the contents of the victim's wallet, appellant decided to forcibly compel the victim to drive numerous city blocks to a bank where,

only with the victim's compelled assistance, could appellant achieve a greater reward. The trial court could reasonably treat this as a new and independent criminal objective, *not merely incidental to the original objective and not a continuation of an indivisible course of conduct*. In the unusual circumstances of this case, appellant could be punished both for the robbery he committed and the kidnapping for the purpose of a distinctly different type of robbery." (*People v. Porter, supra,* 194 Cal.App.3d at pp. 38-39, italics added; see also *People v. Smith* (1992) 18 Cal.App.4th 1192, 1198-1199 [following *Porter* and noted its reasoning had not been challenged].)

Both *Brito* and *Marquez* noted that *Porter* was distinguishable because it involved divisible conduct. (*Brito, supra,* 232 Cal.App.3d at p. 326, fn. 8; *Marquez, supra,* 78 Cal.App.4th at p. 1308, fn. 5.)

Defendant argues there is no evidence that his original plan was limited to robbing Cebotari of her wallet. As explained *ante*, the evidence established the residential robbery was "separate and distinct" from the parking lot robbery.

The rule against a conviction on both the greater and lesser included offense applies when the offenses arise "out of the same act or course of conduct." (*People v. Sanders* (2012) 55 Cal.4th 731, 736.) Because there is a divisible course of conduct here, the rule does not apply. Defendant was properly convicted of two counts of robbery against Cebotari.

VIII

Instructional Error: Multiple Robberies

Defendant contends there were two errors in the instructions that relate to the multiple robberies of Cebotari. First, he contends the trial court erred in instructing the jury pursuant to CALCRIM No. 3515 that "Each of the counts charged in this case is a separate crime." He contends this instruction removed the factual question of whether there were two crimes from the jury and improperly directed a verdict. Second, he contends the trial court should have instructed the jury sua sponte that counts one and two

were in the alternative unless the jury found they were not part of a single transaction. He contends the jury had to find he escaped with the loot to place of temporary safety between the two robberies.

Both contentions are based on defendant's assertion that there can be only one robbery of a single victim until the initial act of robbery ends when the robber has reached a place of safety with his loot. As discussed *ante* in Part VII, the duration of the robbery is relevant for ancillary purposes, such as determining whether a subsequent crime or enhancement occurred in the commission of the robbery. For purposes of determining a perpetrator's guilt of robbery, we look to whether the elements were satisfied, not when the robbery is completed. (See *People v. Bigelow, supra,* 37 Cal.3d at pp. 753-754.)

Defendant has not shown error in the instructions received by the jury concerning the elements of robbery. Thus, his claim of instructional error fails.

IX

Section 654

The trial court sentenced defendant to consecutive terms on counts one (the robbery of Cebotari in the parking lot) and count three (kidnapping for robbery). It sentenced him on count two (the robbery of Cebotari in the condominium) but stayed the sentence pursuant to section 654, finding count two (and count four, burglary) were part of a continuous course of conduct with the kidnapping for robbery.

Defendant contends the court erred in failing to stay the sentence on count one. He relies on the rule that punishment is prohibited for kidnapping for purpose of robbery and "the commission of that very robbery." (*People v. Beamon* (1973) 8 Cal.3d 625, 639.) He repeats his argument that from the time he approached Cebotari in the parking lot until he left the condominium, there was a single course of conduct and only one robbery. We have rejected this contention in Part VIII.

"Under section 654, 'a course of conduct divisible in time, although directed to one objective, may give rise to multiple violations and punishment. [Citations.]' [Citations.] This is particularly so where the offenses are temporally separated in such a way as to afford the defendant opportunity to reflect and to renew his or her intent before committing the next one, thereby aggravating the violation of public security or policy already undertaken. [Citation.]" (*People v. Gaio* (2000) 81 Cal.App.4th 919, 935.) In *People v. Clair* (2011) 197 Cal.App.4th 949, 960, the court applied this rule to impose multiple punishment for emails containing child pornography sent as little as 10 minutes apart.

Here, defendant and Cebotari spent about 15 minutes in the parking lot before he forced her to her condominium and committed a second (and then third) robbery. During this period he had ample opportunity to reflect and to renew his intent before committing the next robbery. The trial court did not err in imposing a consecutive sentence on count one.

X

Correction of Abstract

Defendant contends there are two errors on the abstract of judgment. The People agree these errors should be corrected. We may correct clerical errors in the abstract of judgment at any time. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185.)

Box 6 c on the indeterminate abstract indicates defendant was sentenced to 75 years to life on counts one, three, and five. Actually, the court sentenced him to consecutive terms of 25 years to life on each of these counts. Box 6 c should be corrected to show a term of 25 years to life on counts one, three, and five.

The determinate abstract shows the sentencing on count six, the assault. Because assault with force likely to cause great bodily injury is not a serious or violent felony, the trial court imposed and stayed a two-strike sentence, doubling the mid-term to six years. (§ 667, subd. (e)(C).) The determinate abstract, however, shows a stayed term of three

years in part 1 and a stayed three-year enhancement under sections 667, subdivisions (b)-(i) in part 3. A doubled term under section 667 is not an enhancement. (*People v. Nobleton* (1995) 38 Cal.App.4th 76, 81.) The abstract should be corrected to show a stayed six-year term in part 1, and the box in part 4 showing sentencing pursuant to section 667, subdivisions (b)-(i) or section 1170.12 (strike prior) should be checked.

DISPOSITION

The judgment is affirmed. The trial court is directed to correct the abstract of judgment as set forth in this opinion, and to forward a certified copy of the corrected abstract to the Department of Corrections and Rehabilitation.

/s/
Duarte, J.

We concur:

/s/
Blease, Acting P. J.

/s/
Murray, J.